UPS Supply Chain Solutions, Inc. *and* International Brotherhood of Teamsters, Local Union No. 769. Case 12–CA–113671

May 24, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On November 28, 2014, Administrative Law Judge Ira Sandron issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

We affirm the judge's findings, for the reasons he states, that the Respondent violated Section 8(a)(5) and (1) of the Act by announcing and implementing changes to its Flexible Benefits Plan (Plan) without affording the Union prior notice and an opportunity to bargain.[4] Contrary to the dissent, we agree with the judge that the appropriate remedy includes the requirement that the Respondent rescind its unlawful changes to the Plan, if the Union so requests. It is well established that the remedial aim of a Board order is "restoration of the situation, as nearly as possible, to that which would have obtained but for" the unfair labor practice. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). Accordingly, when an employer violates Section 8(a)(5) by changing its employees' terms and conditions of employment without affording their bargaining representative an opportunity to bargain, the standard affirmative remedy is to order the employer to rescind its unlawful unilateral changes on the union's request and, as the judge found, to "maintain [the terms and conditions of employment that existed prior to the changes] until the [u]nion agrees to the changes, the parties bargain to a collective-bargaining agreement, or they reach an overall valid impasse." See *Goya Foods of Florida*, 356 NLRB 1461, 1462 (2011) (standard affirmative remedy for unlawful unilateral changes to the terms and conditions of employment is immediate rescission of changes and return to status quo ante); *Larry Geweke Ford*, 344 NLRB 628, 628 (2005) ("The standard remedy for unilaterally implemented changes in health insurance coverage is to order the restoration of the status quo ante."). An employer is also required to make employees whole for expenses incurred as a result of the unlawful change or changes. *Goya Foods of Florida*, supra.

Although the dissent agrees that the Respondent unlawfully implemented changes to its Plan,[5] he would not

[1] The Respondent has excepted to some of the judge's rulings during the hearing. After carefully reviewing the record, we find that the judge did not abuse his discretion.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] Because the record suggests that a significant number of the Respondent's employees speak Spanish, we will order the Respondent to post the notice in English, Spanish, and such other languages as the Regional Director determines are necessary to fully communicate with employees. We shall modify the judge's recommended Order to reflect this modification, and to conform to Board's standard remedial language. See *O.G.S. Technologies, Inc.*, 356 NLRB 642, 648 (2011). We shall substitute a new notice to conform to the Order as modified.

[4] In affirming the judge's findings, we do not rely on his citation to *General Die Casters*, 359 NLRB No. 7 (2012), because the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), rendered that decision invalid. We do, however, rely on the judge's citation to *Rose Fence, Inc.*, 359 NLRB No. 6 (2012), which was incorporated by reference in 361 NLRB No. 134 (2014).

Additionally, we agree with the judge, for the reasons he states, that *Courier-Journal*, 342 NLRB 1093 (2004), is distinguishable from the present case. See also *Mackie Automotive Systems*, 336 NLRB 347, 349 (2001) ("It is well settled that an employer's past practices prior to the certification of a union as the exclusive collective-bargaining representative of the employees do not relieve the employer of the obligation to bargain with the certified union about the subsequent implementation of those practices that entail changes in wages, hours, and other terms and conditions of employment of unit employees."). Chairman Pearce and Member Hirozawa did not participate in *Courier-Journal*, supra, and express no view regarding the Board's findings therein.

[5] Citing his partial dissent in *Centinela Hospital Medical Center*, 363 NLRB No. 44, slip op. at 4 fn. 11 (2015), the dissent argues that the Board cannot find that the Respondent independently violated Sec. 8(a)(5) and (1) when it announced the changes to the Plan. We disagree. As we explained in *Centinela Hospital Medical Center*, supra, slip op. at 3 fn. 9, the Respondent's announcements did not indicate that negotiations over the Plan were ongoing; instead, the Respondent presented the changes to the Plan as a fait accompli. The announcements thereby signaled to the employees that the Respondent had no intention of dealing with the Union over the Plan. As the Board stated in *ABC Automotive Products Corp.*, 307 NLRB 248 (1992), the damage to the bargaining relationship had been accomplished by the employer's message to employees that the employer "was taking it on itself to set this important term and condition of employment, thereby emphasizing to the employees that there is no necessity for a collective bargaining agent." Id. at 250 (internal quotation marks omitted). Accordingly,

require the Respondent to rescind those modifications, reasoning that the Respondent should only be required to give the Union an opportunity to bargain regarding the changes. Specifically, our colleague finds that this case falls under the "discrete recurring event" exception to the "overall impasse" rule of *Bottom Line Enterprises*, 302 NLRB 373 (1991), enfd. mem. 15 F.3d 1087 (9th Cir. 1994), which the Board articulated in *Stone Container Corp.*, 313 NLRB 336 (1993). We need not, however, address our colleague's discussion of *Stone Container*. The Respondent did not raise the issue before the judge, the judge did not apply *Stone Container*, and no party argues on exceptions that the judge erred in failing to do so. Thus, the parties did not litigate whether the employer had a past practice involving a discrete recurring event, nor did the judge's decision address whether the changes to the Plan were a discrete, annual recurring event.[6] Accordingly, the argument our colleague advances in this regard is not properly before the Board for consideration. See *Ozburn-Hessey Logistics, LLC*, 362 NLRB No. 180, slip op. at 1 fn. 4 (2015); *Avne Systems, Inc.*, 331 NLRB 1352, 1354 (2000) (Board Member's dissenting argument not made by excepting party is not procedurally before the Board).

Finally, our colleague suggests that the Respondent might be unable to comply with the rescission remedy. However, at the compliance phase of this proceeding, the Respondent will have the opportunity to present evidence that was not available at the time of the unfair labor practice hearing to demonstrate that rescinding the changes to the Plan and restoring the status quo ante would impose an undue burden. See *Larry Geweke Ford*, 344 NLRB at 629 (employer permitted to litigate in compliance whether it would be unduly burdensome to restore the health insurance coverage in effect prior to the unilateral change); *Gaetano & Associates*, 344 NLRB 531, 534 (2005), enfd. 183 F.App'x 17 (2006); *Lear Siegler, Inc.*, 295 NLRB 857, 861–862 (1989).

and contrary to our dissenting colleague, the Respondent's announcements violated Sec. 8(a)(5). See also *Wire Products Mfg. Corp.*, 326 NLRB 625, 627 (1998), enfd. mem. sub nom. *NLRB v. R.T. Blankenship & Associates, Inc.*, 210 F.3d 375 (7th Cir. 2000).

[6] Compare this case with *Nabors Alaska Drilling, Inc*., 341 NLRB 610, 612 (2004), and *St. Mary's Hospital of Blue Springs*, 346 NLRB 776, 782 (2006), where the employers in fact argued that under *Stone Container*, they were privileged to unilaterally implement changes to health insurance. See also *Beacon Sales Acquisition, Inc. d/b/a Quality Roofing Supply Co*., 357 NLRB 789, 789 (2011) (rejecting the employer's argument, based on *Stone Container*, that it was privileged to implement the health insurance premium increases because the employer had not established that an increase in employees' health insurance premiums was a discrete, annually recurring event).

ORDER

The National Labor Relations Board orders that the Respondent, UPS Supply Chain Solutions, Inc., Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with International Brotherhood of Teamsters, Local Union No. 769 (the Union), as the exclusive representative of employees in the following appropriate unit by unilaterally announcing and implementing changes in health insurance benefits:

> All regular full-time and part-time warehouse operations employees employed in the following job classifications: warehouse II and III; senior warehouse; inventory control representatives; inventory control associates II; customer support representatives I; customer support representatives II; order processing representatives II and III; customer care representatives III; and administrative assistant II . . .; excluding all other employees including guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment, notify and, on request, bargain collectively and in good faith with the Union as the exclusive representative of its employees in the appropriate unit.

(b) On request by the Union, restore the health insurance benefits that existed prior to the unilateral changes that were implemented on January 1, 2014, and maintain those terms until the Union agrees to the changes, the parties bargain to a collective-bargaining agreement, or they reach an overall valid impasse.

(c) Make employees whole by reimbursing them, in the manner set forth in the remedy section of the decision, for any loss of benefits and any additional expenses they incurred as a result of the unilateral changes in health insurance benefits that were implemented on January 1, 2014.

(d) Within 14 days after service by the Region, post at its Miami, Florida facility copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

provided by the Regional Director for Region 12, in English, Spanish, and such other languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 26, 2013.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 24, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(5) and (1) of the Act when it modified its Flexible Benefits Plan (Plan) on January 1, 2014, without first giving the Union notice and the opportunity to bargain regarding the planned changes. However, I believe my colleagues have devised an inappropriate remedy for this violation. The majority orders the Respondent to rescind the modifications to the Plan, but this remedy is premised on finding that the Respondent was required not only to give the Union notice and opportunity to bargain over the planned changes, but also to refrain from making changes to the Plan until bargaining resulted in an overall impasse or agreement. As explained below, this case falls within the *Stone Container* exception to the "overall impasse or agreement" requirement.[1] Therefore, because the Respondent would have been permitted to implement the changes even without an overall impasse or agreement, the appropriate remedy is to require the Respondent (among other things) to engage in bargaining regarding the changes, without requiring it to rescind those changes. Moreover, I believe the Board must recognize that this case involves approximately 40 bargaining unit employees, the Plan in question provides healthcare benefits for 75,000 employees, and it is not reasonable to expect that the Respondent can rescind benefit changes regarding only 40 participants. To the extent that make-whole relief is deemed appropriate, I believe the Respondent should be required to make bargaining unit employees whole for any increased costs or expenses associated with the changes, with the make-whole period running from the date the changes were implemented through the time that it has given the Union the opportunity for bargaining.

Facts

The Respondent is a subsidiary of UPS, which provides healthcare and other benefits through its Flexible Benefits Plan to about 75,000 nonunion employees, including the Respondent's approximately 10,000 employees. UPS annually reviews and modifies the Plan, and it sends a summary of material modifications (SMM) to employees. If UPS makes major modifications to the Plan, it sends a new summary plan description (SPD) to employees. Every year from 2004 to 2012, employees received either an SMM or an SPD in September or October, and the modifications to the Plan became effective on January 1 of the following year.[2] In April 2013, the Union was certified as the bargaining representative of a unit of approximately 40 of the Respondent's employees. Negotiations for an initial collective-bargaining agreement commenced in May. Meanwhile, UPS conducted its 2013 annual review of the Plan, just as it had every

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] *Stone Container Corp.*, 313 NLRB 336 (1993).

[2] An SPD was sent in 2009. On three occasions during the 2004–2012 time period, UPS sent an additional SMM to employees at a time other than September or October, and the changes summarized in those SMMs became effective on a date other than January 1 of the following year. However, even when UPS has made additional changes to the Plan at other times during the year, it has still sent an SMM to employees during either September or October, and the changes to the Plan announced in those SMMs became effective on January 1 of the following year.

year since at least 2004; the Respondent announced the modifications to the Plan in August; and the Respondent's employees received an SMM setting forth those modifications in October. The Respondent implemented those modifications on January 1, 2014. Before doing so, it did not give the Union advance notice of the proposed modifications and an opportunity to request bargaining concerning them.

Discussion

It is well established that healthcare benefits are among the terms and conditions of employment that are considered mandatory subjects of bargaining, and it is an unfair labor practice if an employer unilaterally implements changes in healthcare benefits affecting represented employees without giving reasonable notice to the union and an opportunity for bargaining. *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991).

Under the Board's decision in *Bottom Line Enterprises*, if an employer is engaged in negotiations for a collective-bargaining agreement (CBA), it must not only provide notice and the opportunity for bargaining over proposed changes in wages or benefits, the employer must refrain from making those changes until bargaining has resulted in an overall impasse or a new CBA.[3] However, the facts of this case bring it within an exception to the "overall impasse" rule, which the Board articulated in *Stone Container*, supra. Under the *Stone Container* exception, an employer is not required to refrain from implementing a proposed change even though an overall impasse has not been reached in contract negotiations, where the employer had a past practice involving a recurring "discrete event," such as an "annually scheduled" change in wages or benefits. Id. at 336. In these circumstances, the employer's only obligation is to provide the union notice and the opportunity for bargaining, and the Act does *not* require the employer to refrain from implementing the change at the time the "discrete event" is scheduled to occur. Id.; see also *Brannan Sand & Gravel Co.*, 314 NLRB 282 (1994).[4]

This was precisely the situation the Respondent faced here. Since at least 2004, UPS has annually reviewed and modified the Plan and notified the Respondent's employees of those modifications in September or October, and the modifications became effective on the first of January. In other words, modifying the Plan was a discrete recurring event and an established past practice. In 2013, a unit of the Respondent's employees chose union representation. As the time approached for the Respondent to notify its employees of the modifications to the

[3] 302 NLRB 373, 374 (1991), enfd. mem. 15 F.3d 1087 (9th Cir. 1994). The Board in *Bottom Line Enterprises* held that "when . . . the parties are engaged in negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." This rule is subject to certain exceptions, however, including the *Stone Container* exception applicable here. See also *RBE Electronics of S.D.*, 320 NLRB 80 (1995). Because I believe the instant case falls within the *Stone Container* exception, I do not reach and express no view as to whether *Bottom Line Enterprises* and *RBE Electronics* were correctly decided.

[4] I agree with the judge and my colleagues that this case is distinguishable from *Courier-Journal*, 342 NLRB 1093 (2004), and it is likewise distinguishable from *E.I. du Pont de Nemours & Co. v. NLRB*, 682 F.3d 65 (D.C. Cir. 2012). In *Courier-Journal* and *du Pont*, the employees were represented by a union during the period of time when the employer established a past practice of making annual changes to certain benefit plans, which at least colorably permitted the employer to implement similar changes without giving the union any notice or the opportunity for bargaining. Here, by contrast, the past practice was established during a period of time when employees were unrepresented. Consequently, the past practice does not provide a basis for the employer to unilaterally implement similar changes without at least giving the newly certified union notice and the opportunity for bargaining. However, the Board in these circumstances applies *Stone Container*, which, as explained in the text, permits the employer to implement a regularly scheduled change at the requisite time, even though bargaining has not proceeded to an overall impasse or a new CBA. Although the judge did not apply *Stone Container* and the parties have not excepted to his failure to do so, I believe the Board must apply *Stone Container* here as controlling law. See *Kamen v. Kemper Financial Services*, 500 U.S. 90, 99 (1991) (stating that "the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law"). I also note that the General Counsel's answering brief acknowledges that *Stone Container* may be applicable in the instant case.

Additionally, I do not reach the question whether—separate from whether the Respondent unlawfully implemented *changes* to the Plan unilaterally within the meaning of the Supreme Court's decision in *Katz*, 369 U.S. at 743—the Respondent may have unlawfully violated its duty to bargain *upon request* regarding the benefit changes. See id. ("A refusal to negotiate in fact as to any [mandatory] subject . . . , and about which the union seeks to negotiate, violates [Sec.] 8(a)(5) . . . ."); *J. H. Allison & Co.*, 70 NLRB 377, 378 (1946) (employer violates the Act by refusing to engage in bargaining over a mandatory subject as to which the union requests bargaining), enfd. 165 F.2d 766 (6th Cir.), cert. denied 335 U.S. 814 (1948). The complaint alleged only that the Respondent violated Sec. 8(a)(5) by unilaterally implementing the benefit changes. It did not allege that the Respondent unlawfully refused to engage in bargaining upon request.

Finally, unlike my colleagues, I believe the Board cannot appropriately find—in addition to finding that the implementation of the benefit changes on January 1, 2014 violated Sec. 8(a)(5)—that the Respondent independently violated Sec. 8(a)(5) and (1) when it announced those changes in August 2013. As I discussed in more detail in my partial dissent in *Centinela Hospital Medical Center*, 363 NLRB No. 44, slip op. at 4 fn. 11 (2015), I do not believe that the mere announcement of a change constitutes an independent violation of Sec. 8(a)(5) separate and apart from the implementation of the change itself.

Plan anticipated to become effective January 1, 2014, the Respondent and the Union were engaged in negotiations for an initial collective-bargaining agreement. Under well-settled precedent, the Respondent's obligation was to provide the Union notice of the upcoming discrete recurring event and an opportunity to request bargaining concerning the proposed modifications to the Plan. See, e.g., *St. Mary's Hospital of Blue Springs*, 346 NLRB 776, 776 (2006); *Saint-Gobain Abrasives, Inc.*, 343 NLRB 542, 542 (2004), enfd. 426 F.3d 455 (1st Cir. 2005); *Nabors Alaska Drilling, Inc.*, 341 NLRB 610, 613 (2004); *Brannan Sand & Gravel*, supra.[5] The Respondent did not do so, and therefore it violated Section 8(a)(5).[6] However, under the well-established *Stone Container* rule, the Respondent's obligation was to provide notice and the opportunity for bargaining regarding the planned benefit changes, but it had no obligation to refrain from making the changes at the regularly scheduled time when they had been implemented in the past.

Accordingly, the appropriate remedy for the Respondent's violation is an order requiring the Respondent to give the Union an opportunity to bargain regarding the changes implemented on January 1, 2014. I believe it is inappropriate for the Board to require rescission of the changes, i.e., to require the Respondent to "restore the health insurance benefits that existed prior to the unilateral changes that were implemented on January 1, 2014." In my view, a rescission order impermissibly makes the Board's order punitive rather than remedial because rescission is more expansive than the Respondent's violation.[7] Board precedent establishes that rescission is not warranted for a *Stone Container* violation of Section 8(a)(5). See *Brannan Sand & Gravel*, supra at 287 (holding that "ordering recission [sic] of the changes would be inappropriate").[8] Moreover, as noted above, I believe the Board must recognize that this case involves approximately 40 bargaining unit employees, the Plan in question provides healthcare benefits for 75,000 employees, and it is not reasonable to expect that the Respondent can rescind benefit changes regarding only 40 participants. To the extent that make-whole relief is deemed appropriate, I believe the Respondent should be required to make bargaining unit employees whole for any increased costs or expenses associated with the changes, with the make-whole period running from the date the changes were implemented through the time that it has given the Union a reasonable opportunity for bargaining.[9]

[5] In addition to being well settled in Board precedent, the *Stone Container* exception to the "overall impasse" rule of *Bottom Line Enterprises* represents a reasonable accommodation of competing interests. Where an employer has an established past practice of modifying wages or benefits at fixed intervals of time, that past practice is itself a condition of employment, and the employer would violate Sec. 8(a)(5) if it changed that employment condition by discontinuing the practice after its employees selected a bargaining representative. See *Daily News of Los Angeles*, 315 NLRB 1236 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997). Given this reality, it would be unfair to subject to the "overall impasse" rule the employer's ability to maintain the status quo of its past practice. Suppose its employees selected a union to represent them 1 month before the date on which the employer would be required to adjust wages or benefits pursuant to its past practice. To hold that such an employer could not make that adjustment unilaterally absent an overall impasse in bargaining would essentially force the employer to commit an unfair labor practice no matter what it does, since bargaining to a complete initial collective-bargaining agreement or an overall impasse in 1 month is virtually impossible. See *Lee Lumber & Building Material Corp.*, 334 NLRB 399, 402 (2001) (stating that it generally takes approximately 6 months "for employers and unions to negotiate *renewal* collective-bargaining agreements" (emphasis added)), enfd. 310 F.3d 209 (D.C. Cir. 2002). On the other hand, where a past practice has been established during a time when employees were unrepresented, absolving the employer of any duty to bargain regarding an upcoming annual wage or benefits adjustment while negotiations for an initial contract are ongoing would fail to give *any* weight to the fact that a new reality was inaugurated when those employees chose a union to represent them. In *Stone Container*, the Board found a reasonable middle ground between these extremes by holding that an employer in the Respondent's situation must give the union an opportunity to bargain concerning the upcoming discrete, recurring iteration of its past practice, but the parties need not reach overall impasse in bargaining for an entire initial agreement before the employer *may* do what it *must* do in order to avoid violating Sec. 8(a)(5) by discontinuing its established past practice.

[6] As the judge found, the Union became aware of the proposed changes to the Plan sometime in September 2013. But even assuming the Union's awareness of the proposed changes satisfied the "prior notice" requirement, the Respondent still violated Sec. 8(a)(5) by failing to provide the Union an opportunity to bargain before implementing the changes at issue here.

[7] The Board's remedial authority, though broad, is strictly limited to measures that are remedial, not punitive. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11–12 (1940) (citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235–236 (1938)); *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267–268 (1938)). See also *Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 19 (2014) (Member Miscimarra, concurring in part and dissenting in part).

[8] Although the Board in *Brannan Sand & Gravel*, supra at 282, failed to amend the remedy section of the judge's decision, which required the respondent to bargain to agreement over the changes to the health plan, a collective-bargaining agreement, or an overall impasse, id. at 287, I believe that the Board inadvertently failed to do so. The judge had not considered the impact of *Stone Container* on his remedial order because the Board issued *Stone Container* only *after* the judge issued his decision in *Brannan Sand & Gravel*. See id. at 282. Further, the Board in *Brannan Sand & Gravel* specifically stated that "contrary to the judge, [we find] that the [r]espondent *was not obligated to refrain from implementing its proposed changes until an impasse was reached on collective-bargaining negotiations as a whole*." Id. (emphasis added).

[9] I agree with my colleagues that the Respondent should be ordered to post the notice in English, Spanish, and such other languages as the Regional Director determines are necessary to fully communicate with employees.

Conclusion

For the above reasons, I respectfully concur in part and dissent in part.

Dated, Washington, D.C. May 24, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with International Brotherhood of Teamsters, Local Union No. 769 (the Union), as the exclusive representative of employees in the following appropriate unit by unilaterally announcing and implementing changes in health insurance benefits:

> All regular full-time and part-time warehouse operations employees employed in the following job classifications: warehouse II and III; senior warehouse; inventory control representatives; inventory control associates II; customer support representatives I; customer support representatives II; order processing representatives II and III; customer care representatives III; and administrative assistant II . . .; excluding all other employees including guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes in your wages, hours, or other terms and conditions of employment, notify and, on request, bargain collectively and in good faith with the Union as your exclusive bargaining representative.

WE WILL, on request by the Union, restore the health insurance benefits that existed prior to the unilateral changes that were implemented on January 1, 2014, and maintain those terms until the Union agrees to the changes, the parties bargain to a collective-bargaining agreement, or they reach an overall valid impasse.

WE WILL make employees whole by reimbursing them, in the manner set forth in the remedy section of the decision, for any loss of benefits and any additional expenses they incurred as a result of the unilateral changes in health insurance benefits that were implemented on January 1, 2014.

UPS SUPPLY CHAIN SOLUTIONS, INC.

The Board's decision can be found at www.nlrb.gov/case/12–CA–113671 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, D.C. 20570, or by calling (202) 273-1940.

Marinelly Maldonado and *John F. King, Esqs.,* for the General Counsel.

Jonathan L. Sulds and *Angela Ramon, Esqs. (Greenberg Taurig, LLP)*, for the Respondent.

Noah Scott Warman and *Michael Gilman, Esqs. (Sugarman & Susskind, PA),* for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This case is before me on a January 31, 2014, complaint and notice of hearing (the complaint) stemming from unfair labor practice charges that International Brotherhood of Teamsters, Local Union No. 769 (the Union) filed against UPS Supply Chains Solutions, Inc. (the Respondent or SCS) relating to the bargaining unit at its Miami, Florida facility (the facility).

I conducted a trial in Miami, Florida, on September 12 and October 14, 2014, at which I afforded the parties full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

Issues

(1) Following the Union's certification on April 29, 2013, as

the representative of employees at the facility, did the Respondent in August 2013 announce to those employees changes to their health insurance benefits, effective on January 1, 2014, without affording the Union prior notice and an opportunity to bargain; more specifically (a) no longer offering health insurance benefits to employed spouses with alternative health insurance coverage, and (b) charging smokers an additional premium.

(2) Did the Respondent implement those changes on January 1, 2014, without affording the Union notice and an opportunity to bargain?

Witnesses

The General Counsel's witnesses were Juan Nunez, a unit employee and member of the Union's negotiating committee; and Eduard Valero, the Union's business agent.

The Respondent called B. J. Dorfman, a UPS manager; Jenny Schaffer, an in-house attorney for UPS; and Erik Rodriguez, an outside counsel for UPS.

Credibility resolution is not an important factor in this case since there is little disagreement about the underlying facts. Any differences in accounts of what took place during negotiations are not determinative.

Facts

Based on the entire record, including testimony and my observations of witness demeanor, documents, and stipulations, and the thoughtful posttrial briefs that the General Counsel and the Respondent filed, I find the following.

At all times material, the Respondent, a subsidiary of UPS, has been a Delaware corporation with its principal office and place of business in Atlanta, Georgia, and with places of business located throughout the United States, including the facility, where it is engaged in the business of providing transportation and freight services. The Respondent has admitted jurisdiction as alleged in the complaint, and I so find.

On April 29, 2013,[1] the Union was certified as the collective-bargaining representative of the following facility employees:

> All regular full-time and part-time warehouse operations employees employed in the following job classifications: warehouse II and III; senior warehouse; inventory control representatives; inventory control associates II; customer support representatives I; customer support representatives II; order processing representatives II and III; customer care representatives III; and administrative assistant II . . . ; excluding all other employees including guards and supervisors as defined in the Act.

SCS has approximately 10,000 employees, of whom about 40 are in the unit.

The Respondent's Past Practice Prior to the Union's Certification

UPS provides a flexible benefits program to about 75,000 nonunion employees nationwide, including SCS. Each year, with the assistance of expert consultants, UPS reviews its benefits program in the context of health care benefits offered in the industry.

By law, the Respondent sends out to employees an announcement of changes in health care benefits, called summary of material modifications (SMMs). SMMs have been issued in September or October when changes will be implemented the following January 1.[2] In the event of major changes, SCS issues a summary plan description (SPD), describing the upcoming benefits in full detail. This was done in 2009.

Changes for 2014

In 2013, with the goal of keeping its costs and employees' contributions flat, UPS decided on two changes in the flexible benefits program, as described below. The General Counsel does not dispute the basis on which UPS made these determinations, and I have no reason to doubt that the Respondent acted in good faith.

On August 5, UPS distributed to employees in the flexible benefits program nationwide, including those in the unit, a planning guide for annual enrollment from October 14–November 1.[3] It announced the following changes:

- Tobacco premium increase—During annual enrollment you will be asked to certify whether you or your spouse use tobacco. If either of you does [sic], you'll pay a premium increase of $150 per month ($1,800 per year) [unless a smoking cessation program was completed before the end of 2013]. . . .
- Working spouse eligibility—Spouses who work and have access to medical coverage through their employer will not be eligible for medical coverage (which includes drugs and behavioral health) under the Flexible Benefits Plan. . . .

Management held six meetings with groups of unit employees at the facility, on August 26 and 28–30, in which the changes were described in English or Spanish.[4] Human Resources Supervisor Belkis Cruz conducted the meeting at which Nunez attended. Belkis told employees that they would have to go into the computer to remove spouses who would no longer be eligible and to certify that they and their spouses did not smoke.

After Nunez got off from work that day, he called Valero and informed him of the announced changes. Valero subsequently confirmed this with other employees. The Respondent concedes that it had not earlier specifically notified the Union of those changes.[5]

Negotiations on a First Collective-Bargaining Agreement

Negotiations began in May, and the parties have held bargaining sessions about two or three times monthly since then. To date, they have reached no agreement.

At all times, Valero has been the chief union spokesperson, Nunez a member of the Union's bargaining committee, and

[1] All dates hereinafter occurred in 2013, unless otherwise indicated.

[2] See R. Exhs. 4–6, 8, 10–12, and 25; GC Exh. 13, for changes implemented on January 1, 2005, through January 1, 2013.

[3] GC Exh. 6. See also GC Exh. 7, a news bulletin issued on about the same date.

[4] See GC Exhs. 3–5.

[5] See Tr. 88, representation of the Respondent's counsel.

Attorney Rodriguez, the Respondent's chief spokesperson.

By letter dated May 3 to the Respondent, Valero requested information, including a copy of unit employees' health and welfare benefits, for the purpose of collective bargaining. At the May 10 bargaining session, the Respondent provided him that information, including flexible benefits, in a looseleaf binder.[6] These showed past announced and implemented changes in health insurance benefits, including those made at the beginning of a new calendar year.

On July 27 (Rodriguez at Tr. 191), the parties agreed to bargain over noneconomic items first and then turn to economics after that.

At the September 21 bargaining session, Valero stated that it had been brought to his attention that SCS had held meetings with employees concerning the two changes in health insurance benefits. He said that he had never been notified.

Rodriguez did not rebut Valero's testimony that, after Valero raised the subject, management asked to caucus and then came back with the response that the Respondent was not obligated to bargain. This logically would have followed a request by the Union to discuss or negotiate over the changes, and I therefore credit Valero's testimony that he did so.

Rodriguez' account of what he said was more detailed than Valero's, and I credit Rodriguez' testimony as follows. Rodriguez explained that the Respondent did not have to bargain over the changes because it had a long history of making modifications to the plan, almost every year; therefore, the upcoming changes represented a continuation of the status quo.

The changes were implemented on January 1, 2014.[7] No previous bargaining over the changes ever took place; indeed, the parties had no bargaining on the subject of health insurance benefits before then.

Analysis and Conclusions

Health insurance benefits are a mandatory term of employment. *Caterpillar, Inc.*, 355 NLRB 521, 522 (2010) (changes in drug prescription program); C*oastal Derby Refining Co.*, 312 NLRB 495, 497 (1993) (coverage for working spouses); *Trojan Mining & Processing*, *Inc.*, 309 NLRB 770, 771 (1992).

As Judge David Goldman stated in *Latino Express, Inc.*, 360 NLRB No. 112, slip op. 12 (2014), "Board precedent has long been settled that, as a general rule, an employer with an obligation to collectively bargain may not make unilateral changes in mandatory subjects of bargaining without first bargaining to a valid impasse," citing *NLRB v. Katz*, 369 U.S. 736 (1962). The Respondent does not allege impasse. Two other bases on which an employer may lawfully make unilateral changes are that the union engaged in delay tactics or that the employer had economic exigencies that compelled prompt action. See *Pleasantview Nursing Home,* 335 NLRB 961, 962 (2001), revd. in part on other grounds 351 F.3d 747 (6th Cir. 2003); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. 15 F.3d 1087 (9th Cir. 1994). The Respondent has averred neither.

Rather, the Respondent contends that it was not obligated to bargain over its announced and implemented changes in spousal coverage and smokers' premium because it has had the past practice of announcing changes in health care benefits for the following year and then implementing them on January 1. Thus, the Respondent argues, it was merely maintaining the status quo. The Respondent relies on *Courier-Journal (I)*, 342 NLRB 1093 (2004), in support of its position. Such reliance is misplaced.

In *Courier-Journal*, the employer had regularly made unilateral changes in the cost and benefits of the employees' health program, both under the contracts and during hiatus between contracts. The Board stated, "The significant aspect of this case is that the Union acquiesced in a past practice under which premiums and benefits for unit employees were tied to those of non-unit employees." Id. at 1094. The Board distinguished this from a situation in which a current union is not bound by its predecessor union's acquiescence to past practice, citing *Eugene Iovine, Inc.*, 328 NLRB 294, 294 (1999), enfd. 1 Fed. Appx. 8 (2d Cir. 2001). Ibid. Here, the Union was not certified until April 2013; ipso factor, it could not have acquiesced in any changes in health benefits before that time.

Contrary to the Respondent's position, as the Board stated in *Mackie Automotive Systems*, 336 NLRB 347, 349 (2001):

> It is well settled that an employer's past practices prior to the certification of a union as the exclusive collective-bargaining representative of the employees do not relieve the employer of the obligation to bargain about the subsequent implementation of past practices that entail changes in wages, hours, and other terms and condition of employment of unit employees.

See also *General Die Casters*, *Inc.*, 359 NLRB No. 7, slip op. at 25 (2012); Ro*se Fence, Inc.*, 359 NLRB No. 6, slip op. at 9 (2012); *Essex Valley Visiting Nurses Assn.*, 343 NLRB 817, 842–843 (2004), enfd. 455 Fed. Appx. 5 (D.C. Cir. 2012).

The Respondent also asserts that it provided the Union with notice of the changes when, in May, it furnished the Union with information showing previous annual changes in health insurance benefits. However, I cannot conclude that this somehow constituted notice within the meaning of Section 8(a)(5)—the Union had no way to know what, if any, changes the Company contemplated but did not articulate; and the Union could hardly have been expected to negotiate in a vacuum when it had no idea what, if any, the specific changes would be.

The Respondent further argues that the Union, by agreeing on July 27 to bargain about economic items only after noneconomic items were settled, "adopted all of the Flex Plan including the established past practice of its annual changes, knowing that changes were imminent." (R. Br. at 48.) In essence, this is another way of stating that the Union waived the right to bargain over health insurance benefit changes effective January 1, 2014. This argument fails because waiver of a right to bargain based on conduct must be clear and unmistakable. *Alison Corp.*, 330 NLRB 1363, 1365 (2000) ("[I]t must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter"); *Lear Siegler, Inc.*, 293 NLRB 446, 447 (1989). This did not occur here. On the contrary, after the Union learned from employees of the

[6] R. Exh. 3. This included, inter alia, the 2009 SPD and SMMs for changes effective January 1, 2011, 2012, and 2013.

[7] See GC Exh. 9, SMM issued in October.

upcoming changes, the Respondent flat-out refused the Union's request to discuss or bargain over them.

I therefore conclude that the Respondent violated Section 8(a)(5) and (1) by implementing the changes in health insurance benefits on January 1, 2014, without affording the Union prior notice and an opportunity to bargain.

I further conclude that the Respondent's announcement of such changes to employees in August, without affording the Union prior notice and an opportunity to bargain, also violated Section 8(a)(5) and (1). See *Caterpillar, Inc.*, 355 NLRB at 524; *Brannan Sand & Gravel Co.*, 314 NLRB 282 (1994).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By announcing and implementing changes in health insurance benefits without affording the Union prior notice and an opportunity to bargain, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act.

REMEDY

Because I have found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Since the Respondent unilaterally implemented new health insurance benefits, the Respondent shall be ordered to make any unit employees whole for any loss of benefits and any additional expenses that they may have suffered as a result. The make-whole remedy shall be computed in accordance with *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest computed as set forth in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, UPS Supply Chain Solutions, Inc., Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Announcing or implementing any changes in health insurance benefits or other mandatory subjects of bargaining without affording International Brotherhood of Teamsters, Local Union No. 769 (the Union) prior notice and an opportunity to bargain**.**

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request by the Union, restore the health insurance benefits that existed prior to the unilateral changes that were implemented on January 1, 2014, and maintain those terms until the Union agrees to the changes, the parties bargain to a collective-bargaining agreement, or they reach an overall valid impasse.

(b) Make employees whole by reimbursing them, in the manner set forth in the remedy section of the decision, for any loss of benefits and any additional expenses they incurred as a result of the unilateral changes in health insurance benefits that were implemented on January 1, 2014.

(c) Within 14 days after service by the Region, post at its facility in Miami, Florida, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet set, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 26, 2013.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 28, 2014

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT announce or implement changes to your health insurance or other benefits without affording International Brotherhood of Teamsters, Local Union No. 769 (the Union) prior notice and an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act, as set forth at the top of this notice.

WE WILL, on the Union's request, restore the health insurance benefits that existed prior to the unilateral changes that were implemented on January 1, 2014, and maintain those terms until the Union agrees to the changes, we and the Union bargain to a collective-bargaining agreement, or we and the Union reach an overall valid impasse in bargaining.

WE WILL make employees whole by reimbursing them for any loss of benefits and additional expenses they incurred as a result of the unilateral changes in health insurance benefits that were implemented on January 1, 2014.

UPS SUPPLY CHAIN SOLUTIONS, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12–CA–113671 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.